

COMPLIANCE DIRECTOR ROBERT S. WARSHAW'S ADDENDUM to
OAKLAND POLICE DEPARTMENT
EXECUTIVE FORCE REVIEW BOARD REPORT
Use of Force No.: 18F-0067

February 19, 2019
page 1 of 4

The state entrusts law enforcement personnel with great authorities, and police officers have a compact with the community to use that authority judiciously and appropriately. The use of deadly physical force by a police officer is the most extreme use of that authority. Accordingly, any instances of the use of deadly force must be examined and investigated thoroughly.

In the case of Use of Force 18F-0067, a critical piece of evidence is the Portable Digital Recording Device (PDRD) footage from a sergeant who had the foresight to place his camera on the armored vehicle as it came to a stop at the scene of the shooting. This camera provided an unobstructed view of the subject, Joshua Pawlik, and recorded his actions in the moments leading up to the officers' lethal discharge of their weapons.

For this case, I reviewed the Criminal Investigation Division (CID) investigation, the Internal Affairs Division (IAD) investigation, the Executive Force Review Board (EFRB) report, and Chief Anne E. Kirkpatrick's February 11, 2019 addendum to her February 8, 2019 general finding to the EFRB report.

I have found no reference to the use of the video during the questioning of the involved officers. The Department failed to use the video to in any way challenge the involved officers' assertions about Mr. Pawlik's movements. Yet their assertions are contradicted by the raw and enhanced versions of the video – both readily available to the investigators in this case.

An essential part of any investigation is the resolution of discrepancies. IAD and CID are required to do this by Department policy, by the Negotiated Settlement Agreement (NSA), and by responsible police practices. However, in the matter at hand, the investigators – both in their questioning and analysis – failed to address the inconsistencies between officers' statements and the video evidence. The involved officers' descriptions of Mr. Pawlik's movement of his right hand range from a few inches to two feet. In both the CID and IAD investigations, the Department failed to challenge the officers on these inconsistencies. In addition, the questioning in both investigations was deficient, non-invasive, and replete with leading questions that served as attempts to support the justification of the officers' actions.

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Use of Force No.: 18F-0067

February 19, 2019
page 2 of 4

Likewise, despite having access to the officers' statements and all versions of the video, the EFRB members did not address the apparent discrepancies between the statements and the video. With respect to the uses of force, the EFRB members appeared to accept IAD's recommendations at face value. The board was duty-bound to resolve those discrepancies if IAD did not. However, the board failed to do so. In her addendum, Chief Kirkpatrick repeatedly referenced the totality of the circumstances, but her assessment of these circumstances was both disappointing and myopic.

In this incident, officers were dealing with an unresponsive and apparently unconscious man who was laying on the ground between two houses with a handgun in his possession. Despite the presence of the firearm, there was no information that Mr. Pawlik was an immediate threat to anyone or had harmed anyone at that point. There were no citizens in immediate danger. The Department had established a perimeter, and officers were behind excellent cover afforded by the Bearcat armored vehicle they had summoned to the scene. OPD personnel had over 40 minutes to plan viable options for successfully resolving this situation.

Mr. Pawlik roused to consciousness, and the video shows his actions to be consistent with someone who was waking up and attempting to orient himself. He was moving minimally. He was a live human being – and any reasonable officer should not have expected him to remain perfectly still. His movements, as seen on the video, do not coincide with the movements to which the officers claim they reacted. Mr. Pawlik's slight movements did not constitute intent and a reasonable officer should not have concluded such. Any analysis of the officers' actions ignored the presence and intended utility of the Bearcat. Further, the EFRB Chair pointed out that officers did not use the armored vehicle as cover. They utilized it as a shooting platform.

In her addendum, Chief Kirkpatrick dismisses the possibility of sympathetic fire. While she readily accepts that all of the officers reacted to possible *visual* stimulation – as slight as it may have been – within a split-second of each other, she rejects the notion that they could respond similarly to *audio* stimulation. At the time of the shooting, four officers already had their rifles trained on Mr. Pawlik and were ready to shoot. Since the video does not show an overt threatening action on his part, sympathetic fire remains a viable explanation for the near simultaneous discharges by the officers, and the large number of rounds fired.

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February 19, 2019
page 3 of 4

While the video is the *key* piece of evidence in this case, it is not the *only* piece of evidence. The quality of the IAD investigation is evidentiary as well. The video itself is neutral – it shows what it shows. The Department had the video professionally enhanced twice and analyzed once. Further, during the course of our monitoring of this investigation, a Departmental sergeant attempted to enhance the video and provide an analysis of what it showed. In the aftermath of the sergeant's presentation, the Chief discounted its usefulness, quality, and accompanying analysis. In fact, the Chief informed me that the Department would not consider this analysis in the investigation of this case as she considered it substandard and an embarrassment. Nevertheless, it was prominently referenced in the IAD investigation, which was presented to the EFRB.

I agree with the EFRB Chair in his assessment that when examining the circumstances in their totality, Sergeant Negrete's conduct constituted gross dereliction of duty. As part of his reasoning, the EFRB Chair cited multiple failures on the part of Sergeant Negrete. He deployed his own rifle as part of the Designated Arrest Team (DAT), though he had designated two officers with rifles as primary cover officers. He assumed the role of both team leader and talker/cuffer, which divided his attention and did not allow him to effectively supervise the team. He failed to plan for a foreseeable exigency: Mr. Pawlik awakening and not complying with commands. The most important point the EFRB Chair made is that the outcome of this incident was so severe that it needed to be considered when determining whether Sergeant Negrete's conduct rose to the level of gross negligence.

The review in this case begs for consideration of the totality of circumstances in the encounter between the officers and Mr. Pawlik. The event was fully captured on the video from a body-worn camera. Neither the Executive Force Review Board nor Chief Kirkpatrick adequately considered the event as a whole.

After reviewing all of the investigations undertaken by the Department and the resultant deliberations of the Executive Force Review Board, I reject the Chief's principal conclusions in this matter.

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February 19, 2019
page 4 of 4

My determinations of findings are as follows:

Sergeant Negrete, Officer Berger, Officer Hraiz, and Officer Tanaka; Allegation: Violation of MOR 370.27-1 (Level 1) Use of Force – *Sustained*.

Officer Phillips, Allegation: Violation of MOR 370.27-1 (Level 2) Use of Force – *Sustained*.

Officer Tanaka, Allegation: Violation of MOR 314.39-2, Performance of Duty-General for failure to advise the Communications Division of his rifle deployment in violation of DGO K-06 – *Sustained*. I concur with the EFRB's reasoning and determination.

Officer Tanaka, Allegation: Violation of MOR 314.39-2, Performance of Duty-General for self-deploying as lethal cover – *Not Sustained*.

Lieutenant Yu, Allegation: Violation of MOR 234.00-2, Failure to fulfill his command responsibilities – *Sustained*.

Sergeant Negrete, Allegation: Violation of MOR 285.00-1, Failure to Supervise – *Sustained*.



Chief (Ret.) Robert S. Warshaw

Compliance Director